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No. 97-520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

IT CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF *AMICUS CURIAE* OF SOUTHWEST ADMINISTRATORS, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Southwest Administrators, Inc. ("Southwest") hereby requests leave to file the accompanying *amicus curiae* brief. Such brief is submitted in support of the Petition for a Writ of Certiorari filed by General American Life Insurance Company ("General American").

General American has consented to the filing of such brief. Respondents IT Corporation and Harry Joseph Lukowski have not consented.

As set forth in the accompanying brief, Southwest provides claim processing services for various employee benefit plans. In so doing Southwest applies the provisions of its clients' plans to the benefit claims it receives, and writes checks to pay those claims. Neither

it nor its clients have ever considered such routine acts to be fiduciary functions under the Employee Retirement Income Security Act of 1974 ("ERISA").

However, the decision of the Court of Appeals for the Ninth Circuit in this action profoundly changes this accepted status. Under the Ninth Circuit's analysis every claims processing entity, including Southwest, will now be considered an ERISA fiduciary. Not only will this subject Southwest and its employees to substantial personal liabilities which they heretofore have not and should not have reasonably expected, but will adversely affect the employee benefit plans they serve. Southwest will either have to charge more for its services to cover the increased exposure to liability, or will have to substantially limit the services it provides. Either action will be detrimental to the plans and to their participants and beneficiaries.

For the foregoing reasons Southwest respectfully requests leave to file the accompanying *amicus curiae* brief.

DATED: November 19, 1997.

Respectfully submitted,



By: _____
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BRIEF *AMICUS CURIAE* OF SOUTHWEST ADMINISTRATORS, INC. IN SUPPORT OF PETITIONER

SUMMARY OF ARGUMENT

In *Harris Trust and Savings v. Provident Life & Accident Insurance Company*, 57 F.3d 608 (7th Cir. 1995), the Court of Appeals for the Seventh Circuit stated:

> "... the line separating fiduciaries from nonfiduciaries in the ERISA context is not a bright one." *Id.* at 617.

This is indeed correct. Determining just who is and who is not an ERISA fiduciary has been the subject of much litigation. However, despite the fact that a bright-line test may be impossible to establish in all instances, benefit claims processors could rely on a fairly simple formula: claims processing is not a fiduciary function *unless* the claims processor retains the ultimate authority to adjudicate disputed claims.

Unfortunately, the decision of the Court of Appeals for the Ninth Circuit in the within action has eradicated this simple formula. Under the analysis used by the Ninth Circuit most claim processing functions will now be fiduciary functions. Whole classes of persons, who heretofore would never have considered themselves to be ERISA fiduciaries, will now be faced with the substantial liabilities imposed by that statute.

This is not mere hyperbole, for Ninth Circuit's decision reaches far beyond the parties to the current lawsuit. As petitioner General American Life Insurance Company

("General American") pointed out in its brief, some 159 million Americans are covered by private employee health benefit plans, and for 91 percent of these plans claims processing is performed by independent insurance carriers and other third party administrators. (See Brief on behalf of General American, p. 11). The Ninth Circuit's decision, if not modified, will have a major adverse effect on *all* independent claims processors, and therefore on the entire employee benefits industry.

INTEREST OF *AMICUS CURIAE*

Amicus curiae Southwest Administrators, Inc. ("Southwest") processes pension and benefit claims for twenty labor-management employee benefit trust funds covering approximately 258,500 participants. The trust funds are established pursuant to Section 302(c)(5) of the Labor-Management Relations Act (29 U.S.C. § 186(c)(5)) and are commonly known as "Taft-Hartley" funds.

Each trust fund is governed by a board of trustees composed of representatives from employers and labor unions. The boards of trustees are the "named fiduciaries" and "plan administrators" for their respective trust funds.

Southwest is not an insurance company. Rather, it is a third party administrator known in the benefits industry as a "TPA." Like General American, Southwest processes benefit claims and performs related administrative functions for the Taft-Hartley trust funds under contractual arrangements similar to those between General American and respondent IT Corporation. Under those contractual arrangements Southwest follows and implements the benefit plans and policies

established by the boards of trustees. The trustees retain the ultimate authority to adjudicate all disputed claims.

To date neither the boards of trustees nor Southwest itself has considered Southwest to be a fiduciary simply because it processes and pays benefit claims. That common understanding has been based on ERISA itself, on applicable regulations promulgated by the Department of Labor, and on existing case law. This Court's decision, however, substantially changes the prior law, and if unmodified will dramatically alter the relationships between Southwest and its client trust funds.

Southwest therefore has a profound interest in the petition for a writ of certiorari filed by General American, and respectfully asks this Court to grant such petition.

ARGUMENT

In *Kyle Railways v. Pacific Administrative Services*, 990 F.2d 513 (9th Cir. 1993) this Court stated:

> "Third party administrators like Pacific are not fiduciaries under ERISA when they merely perform ministerial duties *or* process claims." *Id.* at 516 (emphasis added).

The maxim was repeated in *PacifiCare, Inc. v. Martin*, 34 F.3d 834, 837 (9th Cir. 1994) and has been expressly cited by other circuits. *See, e.g., Reich v. Lancaster*, 55 F.3d 1034, 1047 (5th Cir. 1995); *Harris Trust v. Provident Life*, 57 F.3d at 613. In *Klosterman v. Western General Management*, 32 F.2d 1119 (7th Cir. 1994) the court stated:

> ". . . the activities and responsibilities of [the third party administrator] in

> administering claims *as a matter of law* do not amount to discretionary authority and it is not a fiduciary." (emphasis added).

Further, in *Santana v. Deluxe Corp.*, 920 F.Supp. 249 (D. Mass 1996) the court stated:

> ". . . where an employee benefit plan has contracted with a third party to provide claims processing and other administrative services to the plan, but has retained discretion to decide disputed claims, courts have universally ruled that the service provider is not a fiduciary of the plan." *Id.* at 254.

The *only* exception has been those situations where the claims processor has retained the *ultimate* authority to grant or deny claims. *Kyle Railways v. Pacific Administrative Services*, 990 F.2d at 518; *Libby-Owens-Ford v. Blue Cross & Blue Shield Mutual of Ohio*, 982 F.2d 1031 (6th Cir. 1993). This final authority is the "crucial factor" that determines fiduciary status. *Tregoning v. American Community Mutual Insurance Company*, 12 F.3d 29, 83 (6th Cir. 1993).

As was noted in *Kerns v. Benefit Trust Life Insurance Company*, 992 F.2d 214, 216 (8th Cir. 1993) the "ultimate claims determination" exception is rooted in ERISA's claims review provisions (Section 503 of ERISA, 29 U.S.C. § 1133) and in the accompanying regulations. Section 503 requires every plan to establish a procedure whereby denied benefit claims may be reviewed by the appropriate named fiduciary. The Department of Labor has stated in its regulations that if these review functions are performed by an insurance company or similar organization then such entity becomes a fiduciary (29 C.F.R. § 2560.503-1(g)(2)).

This is consistent with the Department of Labor's Information Bulletin at 29 C.F.R. § 2509.75-8 (at D-3) which holds that a person is a fiduciary if he retains the "final authority" to grant or deny claims. It follows that where a claims processor does not retain the ultimate authority under Section 503, then it is *not* a fiduciary.

In the instant appeal, however, the Ninth Circuit did not follow the traditional and well-established analysis applicable to claims processors. It did not determine whether General American had the ultimate authority to adjudicate claims. Rather, it decided that General American may well be a fiduciary for either of two independent reasons. First, General American likely had discretionary control over plan administration because it had to exercise some judgment in interpreting IT Corporation's plan. Second, General American had authority and control over plan assets because it could write benefit checks. These conclusions are far too broad.

A. The Need For Judgment In Plan Administration Does Not Always Confer Fiduciary Status

In general terms a claims processor must do the following when it receives a health benefits claim from a participant or beneficiary:

1. Determine whether the person was eligible for benefits at the time the service was received.

2. If so, determine whether the service received was covered by the benefits plan.

3. If so, determine the amount of the benefits payable and the appropriate payee.

4. Issue the benefit check to the payee.

The foregoing services are performed by individuals known as claims adjusters. These services often involve some kind of judgment or interpretation beyond the mere entry of a treatment code. Even determining the proper payee involves some judgment: the adjuster must decide whether the benefit is payable to the participant or to the provider, which in turn requires the adjuster to decide whether an assignment of benefits exists in the form required by the plan and its policies.

But does this judgment make the claims adjuster a fiduciary? One would hardly think so, but the Ninth Circuit's opinion apparently makes a person a fiduciary whenever that person must exercise any judgment or interpretation of a benefit plan's requirements, no matter at what level that decision or interpretation is made.

As noted in the opinion, the contract between IT Corporation and General American required the latter to perform "ministerial functions for the client within a framework of policies, interpretations, rules, practices and procedures made by the client." The Ninth Circuit determined that this framework is "strikingly elaborate for its application to be purely ministerial," implying that decisions and interpretations made within that framework could indeed make General American an ERISA fiduciary. In support of this observation the Ninth Circuit noted that federal judges perform an analogous function: they "apply law to facts within a framework of statutes, rules, and precedent which binds them," but in so doing they must exercise considerable judgment.

However, carrying the judicial analogy one step further, it can also be said that the clerks at the civil filings window also act within a framework of rules and regulations imposed by the court, and they must often exercise judgment and make interpretations while acting

within that framework. Yet we know that the kinds of judgment made by an appellate judge are very different from the kinds of judgment made by a civil filings clerk. Most human beings must exercise some type of judgment or interpretation in their various vocations, no matter how routine their jobs or how detailed the instructions given to them. Indeed, the very need for such judgment is often the critical factor that determines whether a task must be performed by a human rather than by a machine.

Southwest therefore urges that fiduciary status under ERISA cannot turn simply on whether a person must exercise judgment in carrying out his or her plan administrative functions. The issue is the *type* and *degree* of judgment which is necessary or permitted in relation to the plan. In the claims processing context, the type of "judgment" that makes one a fiduciary is the final authority to grant or deny benefit claims.

The "working within a framework" concept is taken directly from the Department of Labor's regulations (29 C.F.R. § 2509.75-8 at D-2), and is the central theme in most judicial decisions concerning the nonfiduciary status of persons performing services for employee health plans. The fact that a person must exercise judgment within that framework does not make the person a fiduciary.

In *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991) the Eighth Circuit Court of Appeals, relying in part on the Ninth Circuit's decision in *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1232 (9th Cir. 1985) held:

> "An entity which assumes discretionary authority or control over plan assets will not be considered a fiduciary if that discretion is sufficiently limited by a pre-existing framework

> of policies, practices, and procedures." *Id.* at 1575.
>
> In *accord, Reich v. Lancaster*, 55 F.3d at 1047.

It is undisputed that General American's contract limits its discretion to a pre-existing framework established by IT Corporation. The Ninth Circuit's analysis is thus directly contrary to *Useden*, *Reich*, and *Gelardi*, and indeed changes the generally accepted relationship between fiduciaries who establish the plan's administrative framework and nonfiduciaries who merely carry out administrative functions within that framework.

B. The Right To Write Checks In Itself Does Not Make A Person A Fiduciary

The alternate (and independent) basis on which the Ninth Circuit determined that General American could be a fiduciary is General American's authority to write checks. According to the Ninth Circuit such authority gives General American control over plan assets, and control over assets makes General American a plan fiduciary.

In so holding the Ninth Circuit distinguished control over assets from control over administration. While the latter requires the exercise of discretion to establish fiduciary status, the former does not. In the Ninth Circuit's opinion *any* control over plan assets, discretionary or otherwise, makes one a fiduciary.

As far as Southwest can determine, this is the first instance where a court has addressed the definitional dichotomy in ERISA § 3(21)(a)(i) (29 U.S.C. § 1002(21)(a)(i)). Unfortunately, there is no guidance in ERISA's

legislative history that would explain, one way or the other, why Congress chose to use the "discretionary" modifier in the first part of the fiduciary definition but not in the second part. It is thus not possible to tell whether any special significance should attach to this discrepancy.[1]

"ERISA makes discretion a sine qua non of fiduciary duty" *Pohl v. National Benefit Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992). Yet a literal reading of Section 3(21)(a)(i) implies that this essential element is lacking when it comes to the management or disbursement of plan assets. If actions which are discretionary are to be distinguished from those which are "purely ministerial," then it follows that even "purely ministerial" authority or control over management or disposition of plan assets would make a person a fiduciary.

This would lead to bizarre results. A functionary who simply enters a treatment code and pushes a button that generates a benefits check has some degree of "control over plan assets." Under the literal reading noted above that person, by simply performing this humble function, would become a fiduciary under ERISA.

Such a literal reading of Section 3(21)(a)(i) not only leads to obviously unintended results but also conflicts with other provisions in ERISA. Section 412 of ERISA (29 U.S.C. § 1112) requires fidelity bonding for all "plan officials." Plan officials are defined as a class of persons who include both fiduciaries and every other person "who handles funds or other property" belonging to a plan. Section 412(a).

---

[1] It is also difficult to determine if any real difference was intended between the first part of Section 3(21)(A)(i) and Section 3(21)(A)(iii).

In 29 C.F.R. § 2580.412-6 the Department of Labor described what is meant by "handling" in Section 412. A plan official "handles" assets if ". . . there is a risk that such funds or other property could be lost in the event of fraud or dishonesty on the part of such person." In other words, a person "handles" if he or she has sufficient control or authority over the management or disposition of those assets to enable fraud to occur.

If in fact Section 3(21)(a)(i) applies to *any* degree of control over plan assets, it follows that anyone who "handles" assets within the meaning of Section 412 must automatically be a fiduciary. In other words, all plan officials are by reason of such status also fiduciaries. Yet as noted above the statutory definition of "plan official" includes both fiduciaries and nonfiduciaries. A literal reading of Section 3(21)(a)(i) thus yields a logical inconsistency.

Southwest submits that the kind of control over assets that makes a person a fiduciary is greater than the kind of control that merely makes one a plan official. If a person has the right to write checks against plan assets that person will always be a plan official (see 29 C.F.R. § 2580.412-6(b)). But that person would not necessarily be a fiduciary.

Whether check writing authority leads to fiduciary status should depend on the *degree* of control over asset disbursement. If the person has the ultimate authority to independently decide who should receive plan payments and how much the payments should be, then that person is a fiduciary. Conversely, if a person can write checks only in accordance with detailed instructions given by others, then that person is not a fiduciary.

Southwest realizes that the distribution of plan assets in accordance with a set of instructions is not very much different than the administration of a plan within a

framework of plan rules and policies. This suggests that the element of discretion — the right to make judgments or decisions outside of a framework imposed by others — is inherent in the fiduciary concept, even with respect to the management or disbursement of assets.

An argument can be made that this minimizes the dichotomy in the statutory definition. Yet such minimalization is not without precedent. As is evident in the cited quote from *Useden v. Acker*, 947 F.2d 1575, *supra*, the Eleventh Circuit Court of Appeals certainly links "discretion" with "authority or control over plan assets."

Whatever the distinction between control over assets versus control over administration, it is wrong to simply conclude that as a matter of law check writing authority always results in fiduciary status. This would mean that nearly every third party claims processor would be a fiduciary, since issuing benefit checks is a typical part of the processor's duties. As noted previously, this would result in a substantial change in existing law, and would be contrary to established precedent.

Southwest submits that check writing is *not* a fiduciary function if the check writer's authority is circumscribed by the terms of the plan itself and by the rules, regulations, and policies adopted by the plan administrator.

CONCLUSION

Southwest does not contend that a claims processor can never be a fiduciary. "Fiduciary status is not an all-or-nothing concept." *Kerns v. Benefit Life Insurance Co.*, 992 F.2d at 217. A person can be a fiduciary in one area of plan administration but not in others.

For example, if a claims processor has the right to adjudicate participant appeals from the denial of benefits, that right would make the processor a fiduciary. The same is true if the claims processor regularly rendered investment advice to the plan.

However, when the entity merely performs the claims processing functions outlined on p. 5 herein, it is *not* a fiduciary. Yet unless the Ninth Circuit's decision in the action is reversed, these functions would by themselves result in fiduciary status. This would not only be contrary to prior law, but would substantially alter the relationships between independent claims processors and the plan administrators who retain them, and would dramatically increase the costs of plan administration.

Accordingly, Southwest respectfully requests that General American's petition be granted.

DATED: November 19, 1997.

Respectfully submitted,

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